

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of KH and TS, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

BARBARA SHARP,

Respondent-Appellant,

and

HERBERT WENZEL,

Respondent.

UNPUBLISHED

June 5, 2001

No. 228603

Allegan Circuit Court

Family Division

LC No. 98-022201-NA

Before: Collins, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Respondent Barbara Sharp appeals as of right the circuit court's order terminating her parental rights to her two children, pursuant to MCL 712A.19b(3)(c)(i), (g), and (j); MSA 27.3178(598.19b)(3)(c)(i), (g) and (j). We affirm.

Respondent argues that the circuit court abused its discretion in admitting into evidence the oral and written reports of service providers and relying on these reports in making its decision, pursuant to MCR 5.974(F). She contends that the basis for seeking termination of her parental rights was different from the reason the court took jurisdiction of the children, and the court therefore should have considered only legally admissible evidence, pursuant to MCR 5.974(E). As this Court explained in *In re Snyder*, 223 Mich App 85; 566 NW2d 18 (1997), where the basis for the court taking jurisdiction of a child is related to the basis for seeking termination of parental rights, "legally admissible evidence (under the rules normally used in civil proceedings) will already have been adduced at the adjudicative-phase trial, and thus *supplemental* proofs, which are presented on a background of such legally admissible evidence, need not be admissible under the Michigan Rules of Evidence." *Id.* at 89-90. However, where

the basis for the court taking jurisdiction is unrelated to the basis for seeking termination of parental rights, the petition seeking termination of parental rights “lacks this background of legally admissible evidence from the adjudicative phase and, thus, such a foundation must be laid before probative evidence not admissible under the Michigan Rules of Evidence may be considered.” *Id.* at 90.

Here, the original petition contained four allegations, three of which concerned only Richard Sharp, respondent’s then husband. Two of those allegations concerned abuse of KH by Sharp. The one allegation that concerned respondent stated that, despite the intervention of services in which respondent had participated for almost one year, respondent’s children continued to be at risk for abuse. Although respondent was not represented by counsel at the adjudicative phase, she was informed of her right to counsel and of her right to request court-appointed counsel if she could not afford to retain counsel, and she opted to proceed without counsel. Respondent admitted the allegations in the petition, and the court accepted her plea and assumed jurisdiction over the children. The petition to terminate respondent’s parental rights, which was filed after KH had been injured twice by respondent’s live-in boyfriend and had been removed from respondent’s custody, alleged that respondent failed to avail herself of or benefit from services offered and that she failed to maintain adequate and safe housing, having continued to reside with a man who had physically and emotionally abused KH.

We find that the second petition is not based on changed or different circumstances, even though respondent was separated from her husband and lived with a boyfriend at the time the petition was filed. Rather, the basis for the court taking jurisdiction of the children was related to the basis for seeking termination of respondent’s parental rights. *Snyder, supra* at 89. Both petitions alleged that, despite numerous services provided, respondent’s children continued to be at risk for abuse. Because the circumstances as they related to respondent had not changed, the circuit court did not err in determining that MCR 5.974(F) applied to the termination proceedings and thus did not abuse its discretion in admitting into evidence all relevant and material evidence, including oral and written reports. MCR 5.974(F)(2). Moreover, respondent’s counsel did not object to the admission of these reports and had the opportunity to cross-examine either the makers of the reports or the witnesses who offered the reports for admission.

Respondent next argues that the court clearly erred in ruling that there was clear and convincing evidence to establish a statutory ground for termination of her parental rights. This Court reviews the court’s findings of fact in a parental rights termination case under the clearly erroneous standard. MCR 5.974(I); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). Once petitioner establishes at least one statutory ground for termination by clear and convincing evidence, the court must terminate parental rights unless there exists clear evidence that termination is not in the child’s best interests. MCL 712A.19b(5); MSA 27.3178(598.19b)(5); *In re Trejo*, 462 Mich 341, 364-365; 612 NW2d 407 (2000). The court’s decision that a ground for termination has been proven by clear and convincing evidence and its decision regarding the children’s best interests are reviewed for clear error. *Id.* at 356-357.

Respondent first contends that the circuit court clearly erred in deciding that MCL 712A.19b(3)(c)(i); MSA 27.3178(598.19b)(3)(c)(i) had been established. Respondent maintains that there was no “condition” that existed regarding her at the initial disposition and, therefore,

no “conditions that led to the adjudication” could “continue to exist.” This argument mirrors respondent’s previous argument that her parental rights were terminated on the basis of an entirely different ground than that which led to the adjudication. However, as discussed above, the condition concerning respondent that led to the adjudication, her failure to protect her children from the risk of abuse despite the intervention of numerous services, also led to the petition requesting termination of her parental rights. Moreover, more than 182 days had elapsed since the initial dispositional order, and the condition continued to exist. Because respondent was no longer participating in services, there was no reasonable likelihood that the condition would be rectified within a reasonable time. Accordingly, and the court did not err in finding that this statutory basis for termination of parental rights had been established.

Respondent alternatively maintains that the circuit court improperly accepted her admission at the initial adjudication, because no factual basis was established to support her plea of parental misconduct, as required by MCR 5.971(C)(2). According to respondent, it would be unfair to construe her acquiescence to adjudication as an admission of a “condition” of parental misconduct because she is mentally limited, she participated in the adjudication without the assistance of counsel, the referee stated that there were “no allegations in regards to the Mother on the petition,” and the FIA worker told her that “the reason we’re in court on this case is due to substantiation of physical abuse by the father.”

Here, respondent is attempting to collaterally attack the jurisdiction of the circuit court over this matter. Jurisdiction in parental rights cases can be challenged only on direct appeal, not by a collateral attack. *In re Powers*, 208 Mich App 582, 587; 528 NW2d 799 (1995). Respondent neither directly appealed the circuit court’s exercise of jurisdiction nor requested a rehearing of this issue as provided by MCL 712A.21; MSA 27.3178(598.21) and, therefore, may not now challenge the court’s exercise of jurisdiction. *Id.* at 587-588.

Next, respondent argues that the court erred in finding that MCL 712A.19b(3)(g); MSA 27.3178(598.19b)(3)(g) had been established. Respondent contends that petitioner had a continuing duty to use reasonable efforts to reunite her with her children even after both children had been removed from her custody, and that if reasonable efforts had been used she would have been able to provide proper care and custody for her children.

Although many services were stopped when KH was removed from respondent’s care and respondent’s income fell substantially because she lost KH’s social security payments, respondent also refused services offered to her during this period. Her visitations with her children were not consistent, and she did not focus on her children during the visits. Respondent chose not to participate in counseling services and stopped attending services that were meant to help her acquire her high school diploma. Respondent’s living conditions deteriorated in terms of suitability for her children because of the number of people she lived with and the character of those people, including her boyfriend, who had hurt KH. The foster care worker testified that she told respondent that it would not be possible to continue a relationship with this boyfriend and regain custody of her children, yet respondent chose to have this boyfriend in her home. Moreover, KH was injured a number of times while in respondent’s care. Although there were no allegations that respondent caused the injuries, she failed to protect KH despite the years of services that she had been provided, and when KH’s collar bone was broken, respondent did not

seek medical attention until the third day after the injury. We conclude, therefore, that the court did not err in determining that respondent had failed to provide proper care and custody for her children and there was little likelihood that she would be able to do so within a reasonable time.¹

Finally, respondent argues that the circuit court erred in finding that the children would be harmed if returned to her care. MCL 712A.19b(3)(j); MSA 37.3178(598.19b)(3)(j). Respondent maintains that none of the social workers or lawyers properly assessed the risk posed by her boyfriend and thus she, as a “limited” individual, could not reasonably have been expected to recognize the risk. She further contends that there was no evidence that the delay in having KH seen by a doctor created any significant risk of harm to him or that the circumstances of such an accident are likely to arise in the future. At the same time, respondent does not advocate immediately returning the children to her care but asks this Court to compel petitioner to reasonably assist her in finding decent housing and reconstructing her support network.

While we agree that the record shows respondent did not intend to hurt her children and that she does require some assistance in day-to-day living because of her intellectual limitations, KH was injured at least twice when respondent lived with her husband and at least twice when she lived with her boyfriend. Respondent failed to seek medical attention for KH’s broken collar bone for three days. These circumstances plainly created a significant risk of harm to KH and indicate that such “accidents” are likely to arise in the future if the children were returned to respondent’s care. Thus, the court did not err in finding that this statutory basis for termination had been established by clear and convincing evidence.

Respondent’s final argument is that the court clearly erred in not finding that termination of her parental rights was against the children’s best interests. She maintains that the evidence showed that she took positive actions to serve her children’s best interests. Our review of the record shows that while there clearly existed a bond between respondent and her children, she also had difficulty handling two children, and her failure to appropriately supervise and intervene to prevent harm put her children at risk. Accordingly, we conclude that the circuit court did not err in finding that no clear evidence, based on the whole record, that termination of respondent’s parental rights was not in the children’s best interests. Thus, having found that statutory grounds for termination had been proven by clear and convincing evidence, the court was required to terminate respondent’s parental rights. *Trejo, supra* at 354.

Affirmed.

/s/ Jeffrey G. Collins
/s/ Joel P. Hoekstra
/s/ Hilda R. Gage

¹ We note respondent’s argument that the petition alleges her inability to maintain stable employment, which was not required by the parent-agency agreement or the family court. This argument is accurate; however, respondent’s inability to maintain employment was not the focus of the family court’s decision to terminate her parental rights.